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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHARLES DUNN COMPANY, INC.,	
Plaintiff and Respondent,	G046622
v.	(Super. Ct. No. 30-2009-00117312)
OCK JA KYMM as Trustee, etc.	O P I N I O N
Defendant and Appellant.	

Appeal from a postjudgment order of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Law Offices of Stuart J. Wald and Stuart J. Wald for Defendant and Appellant.

Ryan & Associates, Gregory R. Ryan and Ellen S. Kornblum for Plaintiff and Respondent.

* * *

Defendant Ock Ja Kymm appeals from a postjudgment order denying her motion to release a judgment lien against her house. She contends the court wrongly found she was judicially estopped from challenging the lien, whose validity she relied upon in obtaining a bankruptcy court order. But defendant's inconsistent positions amply warrant application of judicial estoppel. We affirm.

FACTS

In 2009, plaintiff Charles Dunn Company, Inc., recorded an abstract of judgment against defendant's house in Huntington Beach. The underlying judgment had confirmed an arbitration award for plaintiff against defendant and her husband as "Trustees of SEE MYUN KYMM AND OCK JA KYMM FAMILY TRUST dated March 28, 2003." We affirmed that judgment. (*Charles Dunn Co. v. Kymm* (May 13, 2010, G041985) [nonpub. opn.].)

The next year, the Kymms petitioned for bankruptcy protection. The chapter 7 trustee retained a realtor to market the house.

In the bankruptcy court, the Kymms moved for an order directing the trustee to abandon all interest in the house. (See 11 U.S.C. § 554(b) [court may direct trustee to abandon property "of inconsequential value and benefit to the estate"].) They stated the house was "owned by the Kymms," but maintained it "has no value to the estate, as it is not worth as much as the outstanding secured debts which encumber it."

The Kymms explained their position to the bankruptcy court. They noted the house "is subject to a mortgage in favor of Wells Fargo Bank in the principal amount of $1,495,000." And they claimed "the Property is also subject to an abstract of judgment in favor of [plaintiff], which won a lawsuit against the Kymms pre-petition. Approximately $90,000 is due and secured by that lien." The Kymms claimed the house was worth no more than $1,507,000. They concluded "the Property is not worth enough

to be sold to cover the Wells Fargo mortgage and the Charles Dunn lien . . . ." Accepting the Kymm's position, the court granted their unopposed motion.

After the trustee abandoned any interest in the house,[1] defendant asked the superior court to release the judgment lien. (See Code Civ. Proc., § 697.410, subd. (c) [recorded lien released if "the property owner is not the judgment debtor and . . . the property is not subject to enforcement of the judgment"].) Defendant contended the underlying judgment was entered against the trust, but the house was in her name as her "sole and separate property."

The court denied her motion. It found: "In the Bankruptcy Court the Judgment Debtor, [defendant], made the admission/representation that the amount of the liens were greater than the value of the property and that the property was subject to this judgment lien. They included this lien in the calculations and representations in the Bankruptcy Court. They cannot now be heard to argue that the property is not subject to this lien."

DISCUSSION

Judicial estoppel "rests on the principle that litigation is not a war game unmoored from conceptions of ethics, truth, and justice. It is quite the reverse. Our adversarial system limits the affirmative duties owed by an advocate to his adversary, but that does not mean it frees him to deceive courts [or] argue out of both sides of his mouth . . . behind a smokescreen of self-contradictions and opportunistic flip-flops." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558 (*Ferraro*).)

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[1] Defendant concedes she later accepted a purchase offer "large enough to pay off the entire mortgage, cover limited costs of sale, and have some funds left over." She claims she has paid $44,000 to plaintiff.

Under this doctrine, "'"'"a party who has taken a particular position in litigation may, under some circumstances, be estopped from taking an inconsistent position to the detriment of the other party.' [Citation.]" [Citation.]' [Citations.] The doctrine comes into play when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are completely inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Ferraro*, *supra*, 161 Cal.App.4th at p. 558.) "Many of the decisions which have invoked the doctrine do so when the party sought to be estopped successfully obtained some judicial relief based on a position which that party later seeks to change." (*Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 679 (*Herzog*).)

We review the application of judicial estoppel under several standards. First, "the findings of fact upon which the application of judicial estoppel is based are reviewed under the substantial evidence standard of review." (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 46 (*Blix*).) Next, we independently determine "whether judicial estoppel can apply to the facts," i.e., whether the facts support "the necessary elements of judicial estoppel . . . ." (*Ibid*.) Finally, "because judicial estoppel is an equitable doctrine" (*ibid*.), we review the ultimate decision to apply the doctrine "under an abuse of discretion standard" (*id*. at p. 47).

Defendant concedes four of the five elements of judicial estoppel, disputing only that her positions were "'completely inconsistent.'" (*Ferraro*, *supra*, 161 Cal.App.4th at p. 558.) She claims her position in her motion to release — i.e., plaintiff's judgment lien was invalid — is technically consistent with her earlier representation to the bankruptcy court that the house was subject to that lien. She notes she represented to the bankruptcy court only that the judgment lien existed; she never represented the judgment lien was valid.

This is exactly the kind of "opportunistic flip-flop" that demands application of judicial estoppel. (*Ferraro, supra,* 161 Cal.App.4th at p. 558.) Defendant wanted something from the bankruptcy court — an order directing the trustee to abandon all interest in the house. To get that, she set about convincing the court the house was "not worth as much as the outstanding secured debts which encumber it." And so defendant trotted out plaintiff's judgment lien. The only purpose for mentioning the judgment lien was to show the total encumbrance amount.

Defendant withheld her belief the judgment lien was invalid from the bankruptcy court. Nor did she disclose any of the facts supporting her invalidity claim. She did not tell the court the underlying judgment was entered against her and her husband as trustees. She did not tell the court the house was her separate property.

To the contrary, defendant affirmatively misrepresented those facts to the bankruptcy court. She represented the underlying judgment was entered "in favor of [plaintiff], which won a lawsuit against the Kymms pre-petition" — not against the Kymms as trustees. And she represented the house was "owned by the Kymms" — not by her alone as her separate property.

The record plainly shows defendant's two positions, and we hold they are "'completely inconsistent.'" (*Ferraro, supra,* 161 Cal.App.4th at p. 558.) We see no abuse of discretion in applying judicial estoppel here. (See *Blix, surpa,* 191 Cal.App.4th at p. 46.) As in the typical case where the doctrine applies, defendant "successfully obtained some judicial relief based on a position which [she] later [sought] to change." (*Herzog, supra,* 61 Cal.App.4th at p. 679.) "'The courts will not recognize or tolerate such tactics. A party cannot thus "blow hot and cold." [Citations.] The courts would be impotent indeed if they were compelled to approve such duplicity.'" (*Ibid.*)

Sadly, defendant's duplicity here hearken backs to her earlier tactics. When we affirmed the underlying judgment, we held defendant forfeited her claim she had not agreed to arbitrate — she failed to raise that issue during the arbitration. (*Charles Dunn*

Co. v. Kymm, supra, G041985.) We lamented the "'waste of scarce dispute resolution resources'" by "'game-playing litigants who would conceal an ace up their sleeves for use in the event of an adverse outcome.'" We explained "[c]ourts need not countenance such wasteful gamesmanship." (*Ibid*.) We rejected defendant's game-playing then; we do not accept it now.

DISPOSITION

The postjudgment order is affirmed. Plaintiff shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.